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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR CERTIORARI FILED JULY 3, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1935.

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 42514

INDUSTRIAL TRUST COMPANY, and ORLAND S. GREENE, Executors of the Estate of William M. Greene, Claimants,

vs.

THE UNITED STATES OF AMERICA

I. PETITION—Filed Sep. 25, 1933

The claimants represent that they are respectively a banking corporation under the laws of the State of Rhode Island and a citizen of the United States; that William M. Greene departed this life testate on May 30, 1930, and was at and before the time of his death a citizen of the United States; that in and by the terms of the last will and testament of the said William M. Greene, which was duly admitted to probate in the Probate Court of the town of Westerly, Rhode Island, on July 8, 1930, claimants were made executors, as more fully appears from the exemplified copy of said will, hereto attached and made a part hereof and marked Exhibit A; that claimants accepted the trust imposed upon them by said last will and testament of the said William M. Greene, deceased, and qualified as executors and entered upon their duties as such and are now and ever since their appointment have been acting as such executors; that a duly authenticated copy of the record of the appointment of the claimants as such executors is attached hereto and made a part hereof and marked Exhibit B; that the claimant, Industrial Trust Company, is and at all times herein mentioned, was a corporation under the laws of the State of Rhode Island and located in the Internal Revenue [fol. 2] District of said state; and in accordance with the provisions of the Revenue Act of 1928, the claimants made an estate tax return for the said estate of William M. Greene, deceased, showing a tax liability of $24,168.27, which sum was paid to the Collector of Internal Revenue for the Rhode Island District; subsequently, by letter dated August 2, 1932, the Commissioner of Internal Revenue de-

manded a deficiency in federal estate tax amounting to $102,645.28. Under date of October 17, 1932, a closing agreement was executed by your claimants which was approved by the Under Secretary of the Treasury January 9, 1933. By this agreement it was determined that the proper tax was $128,197.73 subject to a credit of not to exceed eighty per cent for state, estate, inheritance, legacy or succession taxes lawfully paid, subject however, to the right of the taxpayer to file a claim for refund as to the tax involved by the inclusion of a $42,000.00 Equitable Life Assurance Society of the United States policy in the gross estate. The balance of the full amount of the tax, less the appropriate deduction for state, and succession taxes, was thereupon paid to the Collector of Internal Revenue for the Rhode Island District. Such policy was a paid-up policy on the life of the decedent, William M. Greene, payable to his wife, or, in the event of her death before the insured, to his three children or the survivor of them; or, in the event of their death before the insured, to his estate. The wife of the decedent predeceased him, but he was survived by his three children. He had no right under the terms of the policy or the by-laws of the company to change the beneficiary of such policy. He had no power either by the terms of the policy or by the regulations of the company to borrow upon the security of the policy or to surrender said policy for cash or any other consideration.

Claimants say that on November 3, 1932, they duly filed with the Collector of Internal Revenue for the Rhode Island District their claim for refund in the sum of $756.00 with [fol. 3] interest, being the excess of the sums paid over the true tax due from the claimants for the federal estate tax upon such estate; that said claim was in due form and as required by the law and the regulations of the Treasury Department; that the claimants thereby became entitled to an immediate refund of the said sum of $756.00 with interest; that nevertheless the Commissioner of Internal Revenue on August 23, 1933, by a letter bearing the symbols "MT-ET-C1-1367-Rhode Island Estate of William M. Greene, Date of Death—May 30, 1930," addressed to claimants, advised them that said claim was rejected in full, and subsequently the rejection of said claim was duly set forth in the schedule of the Commissioner. Claimants state that said claim was unlawfully and improperly rejected and that claimants

have not received any part of said principal sum or interest, or the benefit thereof by the way of credit or otherwise.

Wherefore claimants pray judgment against the United States of America upon the facts and law for Seven Hundred and Fifty-six Dollars ($756.00), together with interest thereon from date of payment and their reasonable costs and disbursements.

Charles P. Taft II, Attorney for Claimants.

Duly sworn to by C. D. Sheldon. Jurat omitted in printing.

[fol. 4] EXHIBIT "A" TO PETITION

At a meeting of the Probate Court of Westerly, R. I., held this 18th day of June, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that a certain instrument in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, is presented to this Court with a petition in writing signed by Industrial Trust Company, by James M. Pendleton, Manager of its Westerly Branch, praying that said instrument purporting to be the last will and testament and two codicils thereto of said William M. Greene may be proved and allowed and that letters testamentary on the estate of said deceased may be issued to it. Notice thereof having been given by advertisement in "The Westerly Sun" once each week for and during the fourteen days next prior to the day of the date of this meeting, which said notice is satisfactory.

Said instrument purporting to be the last will and testament of said William M. Greene is now read and Fannie T. Pierce Holt and Edward B. Coy, two subscribing witnesses to said instrument are present and being sworn testify, that they were present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be his last will and testament; that, they at the same time, at the request of the said William M. Greene, in his presence and in the presence of each other subscribed their names as witnesses thereto and that said William M. Greene was then of sane mind and more than twenty-one years of age.

Whereupon further consideration of the matter is continued nisi.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 5] At a meeting of the Probate Court of Westerly, R. I., held this 24th day of June, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that a certain petition in writing is presented to this Court, signed by Industrial Trust Company, by its attorneys, Huddy and Moulton, praying that a commission may issue to take the deposition of Burton P. Hollister, one of the subscribing witnesses to a certain instrument in writing purporting to be the last will and testament of William M. Greene, late of said Westerly, deceased; and the deposition of said Burton P. Hollister and Stella Willerding, the subscribing witnesses to a certain instrument in writing purporting to be the first codicil to said instrument purporting to be the last will and testament of said William M. Greene; and the deposition of George H. Warrington, a subscribing witness to a certain instrument in writing purporting to be the second codicil to said instrument purporting to be the last will and testament of said William M. Greene, and that said instruments may be annexed to said commission. Notice thereof having been given by advertisement in "The Westerly Sun" once for and during the seven days next prior to the day of the date of this meeting, which said notice is satisfactory.

Upon consideration thereof it is ordered and decreed that a commission be issued to Albert L. Russell, of Cincinnati, Ohio, to take the depositions of said Burton P. Hollister, Stella Willerding and George H. Warrington, and the Clerk of this Court is hereby directed to have photographic copies of said instrument purporting to be the last will and testament and two codicils thereto of said William M. Greene made, to be retained by him in the files of said Court duly certified, according to law.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 6] At a meeting of the Probate Court of Westerly, R. I., held this 1st day of July, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that the whole subject matter concerning the probate of a certain instrument in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, is by order of this Court continued to the 8th day of July, A. D. 1930, at 10 o'clock, A. M.

Attest: Everett E. Whipple, Probate Clerk.

At a meeting of the Probate Court of Westerly, R. I., held this 8th day of July, A. D. 1930.

Present: Edward M. Burke, Judge.

Be it remembered that the certain instruments in writing purporting to be the last will and testament and two codicils thereto of William M. Greene, late of said Westerly, deceased, together with a petition in writing signed by Industrial Trust Company, by James M. Pendleton, Manager of its Westerly Branch, praying that said instruments may be proved and allowed and that letters testamentary on the estate of said William M. Greene may be issued to it, is now again taken up. The deposition of Burton P. Hollister, taken before Albert L. Russell, by virtue of a commission heretofore issued to him, by this Court, having been duly returned by the said Albert L. Russell and it appearing therein that said Burton P. Hollister, one of the subscribing witnesses to said instrument purporting to be the last will and testament of said William M. Greene was present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be his last will and testament, and that at the same time at the request of said William M. Greene, in his presence and in the presence of Fannie T. Pierce and Edward B. Coy, the other sub-[fol. 7] scribing witnesses to said instrument, he the said Burton P. Hollister subscribed his name as a witness thereto, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of said Fannie T. Pierce and Edward B. Coy, said Burton P. Hollister subscribed his name as a witness thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the last will and testament of

said William M. Greene, and the same is approved, accepted, allowed and ordered to be recorded.

The depositions of said Burton P. Hollister and Stella Willerding, taken before Albert L. Russell, by virtue of commissions heretofore issued to him, by this Court, having been duly returned by the said Albert L. Russell, and it appearing therein that the said Burton P. Hollister and Stella Willerding, subscribing witnesses to said instrument purporting to be the first codicil to the last will and testament of said William M. Greene were present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be a first codicil to his last will and testament, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of each other subscribed their names as witnesses thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the first codicil to the last will and testament of said William M. Greene, and as such is allowed and ordered to be recorded.

The deposition of George H. Warrington, taken before said Albert L. Russell, having been duly returned by him, and it appearing therein that the said George H. Warrington, one of the subscribing witnesses to said instrument purporting to be the second codicil to the last will [fol. 8] and testament of said William M. Greene was present and saw said William M. Greene sign said instrument and heard him publish and declare the same to be the second codicil to his last will and testament, and that at the same time at the request of said William M. Greene, in his presence and in the presence of Edward Colston, the other subscribing witness to said instrument, he the said George H. Warrington subscribed his name as a witness thereto, and that at the same time, at the request of said William M. Greene, in his presence and in the presence of him the said George H. Warrington, said Edward Colston subscribed his name as a witness thereto, that said William M. Greene was then of sane mind and more than twenty-one years of age. And no person appearing to object.

It is thereupon ordered, adjudged and decreed that said instrument is proved to be the second codicil to the last

will and testament of said William M. Greene, and the same is approved, accepted, allowed and ordered to be recorded. It is further ordered that letters testamentary on the estate of said William M. Greene be issued to said Industrial Trust Company, the executor named in said will, and Orland S. Greene, who is named in the second codicil of said will as co-executor with the Industrial Trust Company.

Said Industrial Trust Company and said Orland S. Greene before entering upon said trust are ordered and required to give their several bonds in the sum of Three Million Dollars without surety. This Court doth appoint Howard E. Thorp to take an inventory of all the goods, chattels, rights and credits which were of said William M. Greene and to truly and justly appraise the same according to the present value thereof.

This Court doth direct the Clerk of this Court to give notice of the qualification of said executors in "The Westerly Sun" once each week for three successive weeks.

Attest: Everett E. Whipple, Probate Clerk.

[fol. 9] Will

I, William M. Greene, of the City of Westerly, and State of Rhode Island, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament:

1. I desire all my just debts to be paid.

2. I give, devise and bequeath to The Children's Home of Cincinnati, the sum of ten thousand ($10,000) dollars; to Clovernook Home for the Blind, or its Trustees, the sum of ten thousand ($10,000) dollars; to the Hospital of the Episcopal Church of the Diocese of Southern Ohio, commonly known as the Children's Episcopal Hospital, the sum of ten thousand ($10,000) dollars; to the Old Men's Home of Cincinnati, five thousand ($5,000) dollars; and to the Widows' Home and Asylum for Aged and Indigent Women, five thousand ($5,000) dollars, these two corporations commonly known as the Old Men's and Women's Home, located on McMillan Street, in the City of Cincinnati; to the Home for Incurables, the sum of ten thousand ($10,000) dollars. All the above charitable institutions are located in the City of Cincinnati, State of Ohio.

3. I hereby give, devise and bequeath to my son, Orland S. Greene my watch and chain and ring.

4. I give, devise and bequeath to my son, Milbury M. Greene, all my clothing.

5. If my chauffeur, B. Boelleke, and my gardener, R. Bocksteigel, are in my employ at the time of my death, I give, devise and bequeath to each the sum of one thousand ($1,000) dollars.

6. I hereby give to my daughter, Helen Greene Musgrave, the option of purchasing my property, located at 1840 Madison Road, Cincinnati, Ohio, together with the contents of the house and the garage, including the automobile, at a value to be placed upon the same by my executor, The Industrial Trust Company of Rhode Island. If my daughter [fol. 10] does not exercise the said option to purchase, within a reasonable time, then my son, Orland S. Greene, may purchase the said property upon the same terms. If my son, Orland, does not desire to purchase the said property, then my son, Milbury M. Greene, may purchase the said property upon the same terms. If either of my said children purchase the said property I hereby give, devise and bequeath the proceeds of the sale to my other two children share and share alike in fee simple. If none of my said children elect to buy the said property, then the contents of the house are to be divided among my said three children in such proportion and manner as my daughter, Helen, may decide. The balance of my said property located at 1840 Madison Road, Cincinnati, Ohio, both real and personal, I instruct my executor to sell as soon as conveniently can be done. The proceeds of the sale I hereby give, devise and bequeath to my three children in fee simple share and share alike.

7. I hereby give, devise and bequeath to the Industrial Trust Company of Rhode Island, the sum of thirty thousand ($30,000) dollars in trust, however, to pay the income of said fund in monthly installments during her natural life to my first wife's sister, Mrs. Marie D. Bennett, who now resides at the McCormick Apartment Building, 1133 Lincoln Avenue, Denver, Colorado. I here devise and bequeath the said sum of thirty thousand ($30,000) dollars to my three children in fee simple share and share alike and

instruct my trustee, The Industrial Trust Company of Rhode Island, to divide the said trust fund of thirty thousand ($30,000) dollars, upon the death of the said Mrs. Marie B. Bennett among my three children in equal shares.

8. Of the balance of my property I hereby made the following disposition:

A. I hereby give, devise and bequeath to The Industrial Trust Company of Rhode Island one-third of my property both real and personal and wherever situated, in trust, however, to pay the income for life to my son, Milbury M. [fol. 11] Greene, in quarterly installments. Upon his death to pay the income in quarterly installments to his wife, Gertrude Meehan Greene, during her natural life. If my son, Milbury M. Greene, should die leaving any children, I hereby give, devise and bequeath said one-third of my property in fee simple to his children. If my son, Milbury M. Greene, should die leaving no children, issue of his body, then I give, devise and bequeath the said one-third of my property in fee simple to my two children, Orland S. Greene and Helen Greene Musgrave, share and share alike. Inasmuch as I have advanced from time to time to my son, Milbury M. Greene, various sums of money amounting in all to more than fifty thousand ($50,000) dollars, I hereby direct that fifty thousand ($50,000) dollars be added equally to the shares of my two other children as hereinafter set forth.

B. I hereby give, devise and bequeath to my daughter, Helen Greene Musgrave, in fee simple one-third of my property both real and personal and wherever situated. To this one-third is to be added twenty-five thousand ($25,000) dollars, being one-half of the advancement to my son, Milbury M. Greene.

C. I hereby give, devise and bequeath to my son, Orland S. Greene, in fee simple one-third of my property both real and personal and wherever situated. To this one-third is to be added twenty-five thousand ($25,000) dollars, being one-half of the advancement to my son, Milbury M. Greene.

9. I hereby appoint the said The Industrial Trust Company of the State of Rhode Island, as Trustee and Executor of this my last will and testament. I hereby give to

the said Trustee and Executor power to sell any part or all of my estate in such manner and upon such terms as it may deem best and to reinvest the proceeds thereof and to give all necessary deeds, conveyances and bills of sale; this power can be exercised without any authority or order of court, and the purchasers of the same are not required to see the application of the purchase money. I further [fol. 12] request that said Trustee and Executor be not required to give bond, and that no appraisement of my estate be made.

In testimony whereof, I have hereunto subscribed my name at Westerly, Rhode Island, this fourteenth day of August, in the year of our Lord nineteen hundred and twenty.

William M. Greene.

Signed, sealed, declared and published as his last will and testament, by William M. Greene, in our presence, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Fannie T. Pierce, Address: Westerly, R. I.; Edward B. Coy, Address: Westerly, R. I.; Burton P. Hollister, Address: 1325 Union Trust Building, Cincinnati, Ohio.

Codicil

I, William M. Greene, of the City of Westerly and State of Rhode Island, being of sound and disposing mind and memory, do hereby make, publish and declare this to be a codicil to my last will and testament which was executed at Westerly, Rhode Island, on the fourteenth day of August, nineteen hundred and twenty.

(1) I hereby revoke all of Clause Number Two of said will, relating to gifts to certain charitable institutions located in the City of Cincinnati, Ohio, and I hereby ratify and confirm all the other clauses, items and provisions of said will.

(2) Inasmuch as my second wife may have a child and inasmuch as I have made provision for said child, I do not deem it necessary to make any further provision for the said child by my will.

In testimony whereof, I have hereunto subscribed my name at Cincinnati, Ohio, this 25th day of April, in the year of our Lord nineteen hundred and twenty-one.

William M. Greene.

[fol. 13] Signed, sealed, declared and published as a codicil to his last will and testament by William M. Greene, in our presence, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

Burton P. Hollister, Stella Willerding.

Second Codicil to Will of William M. Greene

I, William M. Greene, of the City of Westerly and State of Rhode Island, being of sound and disposing memory, do hereby make and declare this as and for a second codicil to my last will and testament which was executed at Westerly, Rhode Island, on August 14, 1920.

(1) I hereby affirm my said last will and testament dated August 14, 1920, and the first codicil thereto, dated April 25, 1921.

(2) I have made no provision in said will or said codicil dated April 25, 1921, or in this codicil, for any child which I may have by my second wife, Lillian Louise Greene, for the reason that I have made ample provision for any such child by the terms of an agreement with my said wife, Lillian Louise Greene, dated May 9, 1921.

(3) I hereby nominate and appoint my son, Orland S. Greene, as co-executor of my will with the Industrial Trust Company of the State of Rhode Island, with the same powers and duties as provided in said will for said Industrial Trust Company, and further direct that no bond be required of him as such executor.

In Testimony Whereof, I have hereunto subscribed my name at Cincinnati, Ohio, this 9th day of May, in the year of our Lord nineteen hundred and twenty-one.

William M. Greene.

[fol. 14] Signed, sealed, declared and published as a second codicil to his last will and testament by William M. Greene, in our presence, who, at his request and in his

presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

Edward Colston, George H. Warrington.

EXHIBIT "B" TO PETITION

Letter Testamentary

The State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

By the Probate Court of the Town of Westerly, in the County of —— (L. S.) Washington, and State aforesaid,

To Industrial Trust Company, of the City and County of Providence and State aforesaid, and Orland S. Greene, of the City of Cincinnati, County of Hamilton and State of Ohio, Greeting:

Whereas, this Court has this day proved, approved, allowed, and caused to be recorded, the Last Will and testament and two codicils thereto, of William M. Greene, late of said Town, deceased, wherein you are named as the Executors thereof, and you having accepted said trust, and given Bond as the law directs, are, by these presents authorized and empowered to recover, receive and take possession of, the estate whereof the said William M. Greene died, seized and possessed, and the same to administer, according to law, and to the provisions of said Last Will and Testament. For the performance and execution thereof, this shall be your sufficient warrant.

[fol. 15] Witness: Edward M. Burke, Esquire, Judge of the Probate Court of the Town of Westerly, this 8th day of July, in the year of our Lord one thousand nine hundred and thirty.

Everett E. Whipple, Clerk.

State of Rhode Island and Providence Plantations

Clerk's Office of the Probate Court of the Town of Westerly, in the County of Washington, in said State

I, Everett E. Whipple, Clerk of said Court, having, by law, the custody of the seal, and all the records, books, documents and papers of or appertaining to said Court,

hereby certify the papers hereto annexed to be true copies of papers appertaining to said Court, and on file and of record in said office.

In attestation whereof, I have hereunto set my hand and have affixed the seal of said Court, this 11th day of September, A. D. 1933.

Everett E. Whipple, Clerk.

State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

I, Edward M. Burke, Sole Judge of the Probate Court of the Town of Westerly, in the County of Washington, in said State, exercising probate jurisdiction, do hereby certify and make known unto all to whom these presents shall come, that Everett E. Whipple, who signed the annexed certificate, is the Clerk of said Court, duly elected and qualified, and has the charge and custody of the records, files and seal thereof; that the seal affixed to said certificate is the seal of said Court; that the signature to said certifi- [fol. 16] cate is the proper handwriting of said Everett E. Whipple, and that the attestation of Everett E. Whipple, Clerk, as aforesaid, is in due form.

In witness whereof, I have hereunto set my hand at said Westerly, this 7th day of September, A. D. one thousand nine hundred and thirty-three.

Edward M. Burke.

State of Rhode Island and Providence Plantations

WASHINGTON, SC.:

I, Everett E. Whipple, Clerk of the Probate Court of the Town of Westerly, in the County of Washington in said State, do hereby certify and make known unto all to whom these presents shall come, that Edward M. Burke, who signed the annexed certificate, is the sole Judge of said Court, duly elected and qualified, and that the signature to said certificate is the proper handwriting of said Edward M. Burke, and that the attestation of said Edward M. Burke is in due form.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at said Westerly this 11th

day of September, A. D. one thousand nine hundred and thirty-three.

Everett E. Whipple, Clerk.

II. General Traverse—Filed Nov. 4, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

[fol. 17] III. Argument and Submission of Case

On May 8, 1934, this case was argued and submitted on merits by Mr. Charles P. Taft, 2nd, for plaintiffs, and by Mr. Guy Patten, for defendant.

[fol. 18] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**—Filed Feb. 4, 1935

Mr. Charles P. Taft, 2d, for the plaintiffs.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General Frank J. Wideman, for the defendant.

In determining the net estate of decedent for the purpose of estate tax, the defendant included in the gross estate the amount of $42,000 represented by an insurance policy on decedent's life, and, as a result of such inclusion, collected a tax of $756. The executors claim this was erroneous for the reasons that (1) the policy was surrendered by decedent for paid-up insurance without further provision for surrender; (2) the policy reserved no right in the insured to change the beneficiary; (3) there was no power in the insured either by the terms of the policy or the regulations of the company to borrow upon the security of the policy; and (4) the inclusion of the policy in the gross estate in view of the foregoing circumstances violates the due process clause of the fifth amendment to the Constitution.

The defendant insists that the decedent did not divest himself of all beneficial interest in the amount receivable under the policy; that he had and retained for the benefit of his assigns or his estate a substantial right, title, and interest which ceased by reason of his death, and that Congress possessed constitutional power to impose an estate tax upon the interest which ceased by reason of death.

Special Findings of Fact

1. Plaintiffs are the executors of the estate of William M. Greene, who died May 30, 1930, a resident and citizen of Rhode Island. May 29, 1931, they filed an estate-tax return showing a gross estate of $2,434,015.73 and deductions of $574,667.16, resulting in a net estate of $1,859,348.57 and a tax of $120,841.37. After taking a credit of $96,673.10 for State inheritance tax, the return disclosed a Federal tax of $24,168.27, which was paid May 29, 1931.

A life-insurance policy for $113,893.44 taken out by decedent on his own life in the Union Central Life Insurance [fol. 19] Company, and payable to Helen Greene Musgrave, Milbury M. Greene, and Orland S. Greene, children of decedent, was included in the gross estate in the return less $40,000 thereof, receivable by the beneficiaries and not subject to tax, which exemption of $40,000 was allowed by the Commissioner of Internal Revenue in his final determination of the estate-tax liability.

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society, was not included in the gross estate in the return filed by plaintiffs but was included by the Commissioner in his final determination, and this is the policy involved in this suit.

2. Upon final determination the Commissioner increased the gross estate to $2,480,550.43 and deductions were allowed of $539,464.50, resulting in a net estate of $1,941,085.93 and a net Federal estate-tax liability of $128,197.73. In this final determination the Commissioner included in the gross estate the paid-up policy of $42,000 referred to in finding 1.

October 17, 1932, a closing agreement in reference to the tax liability of the estate was executed by plaintiffs and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct

tax liability was $128,197.73, subject to a credit of not to exceed eighty per cent for state, estate, inheritance, legacy, or succession taxes lawfully paid and subject also to the following clause therein contained: "Whereas, said taxpayer hereby agrees to this determination, reserving, subject to statutory limitations, the right to file a claim for refund as to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society of the United States policy in the gross estate."

3. Thereafter, on November 1, 1932, upon allowance of the appropriate credits for State inheritance taxes, as provided in the closing agreement, plaintiffs paid the balance of the full amount of the tax of $1,471.28, together with interest thereon of $126.29.

November 3, 1932, plaintiffs filed a claim for refund for $756 and interest thereon on the ground that the Commissioner erred in including in the gross estate, in his determination of the estate-tax liability, the aforementioned paid-up life insurance policy on the life of the decedent in the amount of $42,000 because (1) the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy. It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the beneficiaries did not make the policy taxable. The claim for refund was rejected by the Commissioner August 23, 1933.

4. The policy of $42,000 was a paid-up policy at the time of the death of the decedent which had been taken out by the decedent upon his own life, and upon which premiums had been paid by him. The policy was dated March 2, 1892, and contained the following provisions:

"Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, [fol. 20] or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city of New

York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

"This policy becomes incontestable two years from its date of issue. It provides for a paid-up policy after three years. It grants freedom of residence, travel, and occupation after one year. It gives to William M. Greene a choice of six methods of settlement upon the completion of the tontine period, on the 2 March 1912, namely:

"I. The surrender of the policy for its full value (consisting of the entire reserve, amounting to $13,652, Thirteen thousand and six hundred and fifty-two dollars together with the surplus then apportioned by the society) either in 1, cash; 2, paid-up assurance; 3, a life annuity; or

"II. The continuance of the policy, and the withdrawal of the accumulated surplus, either in 1, cash; 2, paid-up assurance; 3, an annuity.

"H. B. Hyde, President.

"W. Alexander, Sec'y."

February 19, 1912, the decedent endorsed on this policy the following: "Surrendered as of Mch. 2, 1912, for its value in paid-up insurance."

The company, by its appropriate official, made the following endorsement on the policy March 4, 1912:

"Inasmuch as the premium due on March 2nd, 1912, has not been paid on the within policy it is hereby agreed and declared that in accordance with the wish of the assurant, this policy has become a paid-up policy of $42,000.00, forty-two thousand 00/100 dollars, without profits or participation in deferred or other dividends, and requiring no further payments, except for extraordinary privileges."

5. Jennie D. Greene, wife of the decedent, predeceased him, but he was survived by his three children, Helen Greene Musgrave, Milbury M. Greene, and Orland S. Greene, to whom the proceeds of the policy in the amount of $42,000 were paid upon the death of the decedent. The tax paid by the estate, because of the inclusion in the gross estate of the proceeds of the $42,000 policy in question, was $756.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The question for decision is whether the proceeds of a life-insurance policy may be included in the gross estate of the insured for the purpose of the estate tax imposed by [fol. 21] the Revenue Act of 1926 when the policy provides for payment to certain named beneficiaries, but, in the event of their death prior to that of the insured, then to the executor, administrators, or assigns of the insured, and when the policy is silent as to whether the insured might change the beneficiary, withdraw the cash-surrender value, or pledge the policy as security for a loan.

The insurance policy in question was taken out by the decedent on his own life March 2, 1892, and all premiums were paid by him. The policy contract as originally issued to the insured upon a written application by him was a life policy for $50,000 and gave the insured control over the proceeds and granted him certain privileges to change the contract to a paid-up policy. The privilege of accepting a paid-up policy for $42,000 was exercised by the insured in 1912. The policy provided that its proceeds should be paid at the death of the insured to his wife, if living, or if she should not be living, then payment should be made to his children, and, in the event both his wife and his children should predecease him, the proceeds should be paid to his assigns or to his estate. The policy did not expressly reserve the right in the insured to change the beneficiaries. He died May 30, 1930. At that time his wife had died but his children were living and the proceeds of the policy were paid to them.

The question upon which the decision in this case must turn is whether the provision of the policy that if the beneficiary named should predecease the insured the proceeds

of the policy should be paid to such other person as the insured might designate, or to his estate, requires the inclusion of the amount of the policy (the $40,000 exemption having already been allowed) in the decedent's gross estate under section 302 (g), Revenue Act of 1926. That section provides that the value of the gross estate of the decedent shall include the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, "to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Subdivision (h) of the same section makes the part quoted applicable whether the policy was taken out before or after the effective date of the Revenue Act of 1926.

We are of opinion that the amount of the policy in question was properly included in the decedent's gross estate for the purpose of determining the net estate subject to the tax. At the outset it should be observed that the language of the statute is very broad and by its plain terms includes all insurance taken out by the decedent on his own life irrespective of when taken out and, also, whether or not the insured retained unqualified control over the proceeds of the policy at all times after the contract was issued. It may well be that a life-insurance policy absolutely assigned or made payable to a beneficiary, his executors, administrators, or assigns would not constitute a part of the gross estate of the insured under the section in question, but with such a case we are not here concerned. The unequivocal language of the statute and the legislative history of the provision in question manifest an intent and purpose to reach the proceeds of all insurance taken out by the decedent upon his own life, allowing an exemption of $40,000 as to such insurance payable to specific beneficiaries where, in [fol. 22] cases like the one at bar, such insurance is payable to such person as the decedent may designate other than the original beneficiary named in the policy or to his estate in the event the first-named beneficiary predeceased the insured. The statutory provision in question first appeared as section 402 (f) in the Revenue Act of 1918 and has been

reenacted without change in all succeeding statutes.[1] In reporting the Revenue Act of 1918 the Ways and Means Committee said (H. Rep. 767, 65th Congress, 2d session, page 22):

"The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum."

The foregoing statement makes it clear that Congress incorporated this provision in the statute for the sole purpose of requiring the proceeds of all insurance, with the exception of the exemption specified, taken out by the de-

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[1] Section 402 (f), Revenue Act of 1921; section 302 (g), Revenue Acts of 1924 and 1926.

cedent on his own life to be included in his taxable estate, although the insured or his executor has no direct control over insurance payable to a specific beneficiary so long as that beneficiary lives. A consideration of the nature of the tax further demonstrates the applicability of the statute to all insurance taken out by the decedent on his own life, qualified only by the exemption allowed, and also removes any doubt that may exist as to the validity of the provision in question. The estate tax is imposed upon the privilege to transmit or the transmission or receipt of property by death and rests upon the principle that death is the generating source of valuable property rights not theretofore possessed or enjoyed by the recipient. Knowlton v. Moore, 178 U. S. 41, 57; Chase National Bank v. United States, 278 U. S. 372. The question in every case is not [fol. 23] whether there has been a transfer, in the strict sense of the term, of property by death, but whether death has brought into being or ripened for the recipient of the donor's bounty valuable property rights not theretofore fully enjoyed. Tyler et al. v. United States, 281 U. S. 497. In the last-mentioned case the court said at pages 502 and 503: "A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way. The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

The tax is not limited to the transmission of property directly from the decedent, but includes, as well, property,

the completed transfer or the possession and enjoyment of, which relates to or is dependent upon the death of the decedent. Porter v. Commissioner, 288 U. S. 436; Chase National Bank v. United States, supra; Tyler v. United States, supra. Congress has from time to time expanded the bases for such taxation in furtherance and in aid of the purpose to reach inter vivos transfers which are mere substitutes for testamentary dispositions as well as actual transfers at death. It was in accordance with this principle and purpose that the section in question was enacted, and its history shows that Congress merely recognized the fact that insurance taken out by a decedent upon his own life, payable at his death, and for which he pays all premiums, bears such a close relationship to death, and the shifting of the economic benefits is so contingent and dependent upon the event of death, that the amount receivable is commonly regarded as a part of the estate which he leaves when he dies.

Plaintiffs insist that the rights of the beneficiaries named in the policy were vested and that nothing whatever passed to them upon the death of the insured. For the purpose of this case we think this statement is not entirely accurate. In the designation of the beneficiary we think the decedent did not divest himself (his estate) of all beneficial interest in the proceeds of insurance payable under the policy and his interest therein was not extinguished until his death. No absolute right was acquired by the beneficiary during the lifetime of the insured to the proceeds of the insurance. Such right was contingent upon the prior death of the decedent. This right passed under a contract to which the decedent was a party. Such interest as the named beneficiaries in this case had would have been wholly extinguished by their death prior to that of the insured, and, in such event, the proceeds of the policy would have been payable to such person as the insured might designate or to his [fol. 24] estate. We think it cannot be successfully contended that these contingencies were so remote as to take the case outside the provision of the statute for we cannot speculate upon whether a beneficiary will outlive the insured. A beneficial interest in the proceeds was reserved by decedent to his estate or his assigns, in case he survived the beneficiaries, and passed to his children only in the event they survived him and also his wife. So long, therefore, as the decedent lived it could not be known that the

beneficiaries named in the policy would receive the proceeds of the insurance. Whatever their interests, there was not a complete transmission of the proceeds or an absolute right thereto during the lifetime of the insured. His death was the indispensable event giving rise to or enlarging valuable property rights not theretofore possessed or enjoyed. In Klein et al. v. United States, 283 U. S. 231, the court said: "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare Tyler v. United States, 281 U. S. 497."

In Burnet v. Wells, 289 U. S. 670, the court pointed out that amendments had been made to the statute from time to time for the purpose of preventing avoidance of tax upon estates and, after citing various decisions in cases where various methods had been employed to avoid the estate tax, said at page 677: "In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition." And, again at page 679 the court said: "One who takes out a policy on his own life, after application in his own name accepted by the company, becomes in so doing a party to a contract, though the benefits of the insurance are to accrue to some one else. Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 177; Vance on Insurance, pp. 90, 91, and 108. The rights and interests thereby generated do not inhere solely in those who are to receive the proceeds. They inhere also in the insured who in cooperation with the insurer has brought the contract into being."

The case of Llewellyn v. Frick, 268 U. S. 238, cited by plaintiffs, is not in point here. That case held merely that section 402 (f) of the Revenue Act of 1918 was not retroactive and that the statute referred only to transactions taking place after its passage, and that the latter provision in the Revenue Act of 1924 making an equivalent provision applicable to transactions which took place prior to the

enactment of the act was an aid to the conclusion that the provision in the earlier act was not intended to be retroactive. It appears that the insurance policy involved in the Frick case reserved certain powers and options to the insured to change the policy, but the effect of these reserved powers was not considered by the court until the decision in Chase National Bank v. United States, supra. In the last-mentioned case the court was dealing with policies of insurance in which the insured reserved the power to change the beneficiary, and it was held that termination at death of the power of the decedent to change beneficiaries, with the consequent passing to the designated beneficiaries of all [fol. 25] rights under the policies freed from the possibility of its exercise, was the legitimate subject of a transfer tax. The question involved in the case at bar was not before the court in the the Chase National Bank case and was not discussed, and we find nothing in the opinion of the court contrary to our conclusion in the case at bar.

Art. 27, Regs. 70, as amended by T. D. 4331, XI-I C. B. 330, provides that all insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, "must be included in the gross estate where the decedent during the life retained legal incidents of ownership in the policies of insurance * * *." Following this provision certain examples are given as an indication of when the proceeds are to be included in the gross estate, but such examples were not intended to be exclusive. This regulation was continued in Art. 27, Regs. 80. And Art. 25 of such regulations provided that "the decedent possesses a legal incident of ownership if the rights of the beneficiary to receive the proceeds are conditioned upon the beneficiary surviving the decedent." We think these regulations are a proper interpretation of the statute.

The United States Board of Tax Appeals has held that the proceeds of a life-insurance policy taken out by the decedent on his own life and payable to designated beneficiaries, without express provision in such policies that the insured might change the beneficiary, are not includable in the gross estate of the decedent. Liebes v. Commissioner, 20 B. T. A. 731; Blood v. Commissioner, 22 B. T. A. 1000; Reed v. Commissioner, 24 B. T. A. 166; Parker et al. v. Commissioner, 30 B. T. A. 342; Reybine, Executrix, v. Commissioner, 31 B. T. A. 314. In all of the above cases, except

that of Reybine, Executrix, the proceeds of the policies involved were payable to the decedent's estate or to his assigns if the designated beneficiaries died prior to the death of the insured. In the Reybine case the insurance policy was unconditionally assigned to a trust which the insured had no power to revoke. That decision is therefore not in point here. In none of the cases cited above, except Parker et al. v. Commissioner, did the Board of Tax Appeals discuss the precise point raised in the case at bar. In the last-mentioned case the Board said: "The provision in the policy that in case of death of beneficiary prior to that of insured, the insurance would be payable to the executors, administrators, or assigns of the insured, is not sufficient to prevent the vesting in the beneficiary from being complete. No act of the insured could prevent the beneficiary from receiving the full $10,000 of insurance on his death. Her interest could be defeated only by her death prior to that of the insured." In our view the fact stated in the last sentence of the quoted statement from the Board brings a case, such as the one at bar, within the express language of the taxing act and discloses, we think, such an interest in the contract and its proceeds in the decedent as to justify the inclusion of the amount of the policy in the gross estate. For this and other reasons herein stated, we are unable to concur in the decisions of the Board, and also the decision to the same effect in Ballard v. Helburn (D. C. Ky.), decided January 4, 1934.

Plaintiffs next contend that if section 302 (g) of the Revenue Act of 1926 taxes the proceeds of a life-insurance policy, such as the one in question, it violates the due-process clause of the fifth amendment to the Constitution. [fol. 26] This contention seems to be based upon the proposition that title to the proceeds of the policy taken out by the decedent on his own life had completely vested in the beneficiaries named in the policy and that the inclusion thereof in the gross estate would be to measure the tax of the decedent by the inclusion of the property of another. We think this contention cannot be sustained for the reasons hereinbefore given. The Supreme Court has repeatedly sustained the power of Congress to impose death taxes. Knowlton v. Moore, supra; Edwards v. Slocum, 264 U. S. 61; Nichols v. Coolidge, 274 U. S. 531. And, in so doing, it has avoided any objection to such legislation being retroactive or affect-

ing vested interests upon the principle that such taxes are imposed upon "* * * not the interest to which some person succeeds upon a death, but the interest which ceased by reason of the death." The opinions in Tyler v. United States, supra, and Klein et al. v. United States, supra, were based upon this point. Since Knowlton v. Moore, supra, it has been settled that the power of Congress to impose death taxes, under whatever form or name it may adopt, rests upon the principle that death is the generating source upon which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." Knowlton v. Moore, supra, page 57. This principle was reaffirmed in Tyler v. United States, supra.

In the instant case, the rights of the decedent's children were contingent, in the first instance, upon the death of their mother who was named as the first beneficiary, and, in the next, upon the death of the decedent. The death of the wife of the insured removed the first contingency. We think there can be no distinction between the rights of the children, which were contingent upon their surviving their mother, and the rights of the decedent, which were contingent upon his surviving the children. Upon the death of the wife of the insured, the matter was then reduced to the provision that the policy was payable to the children or the decedent, depending upon which survived the other. Under the terms of the policy all were equal in character, hence they were equal under the taxing act. When the interests of the beneficiaries are stressed, a like emphasis must be laid upon the interest of the decedent. The position of plaintiffs appears to assume that the proceeds of the policy in question were payable to the beneficiaries named, their heirs, executors, or administrators, as was the case in the Central Bank of Washington v. Hume, 128 U. S. 195, cited by plaintiffs, but the policy in this case was not so payable. This marks the distinction between an interest completely vested in money payable in the future and an interest wholly contingent. If the interest is contingent and the contingency is death, then we think it is within the power of Congress to impose the tax in question. Klein et al. v. United States, supra; Tyler et al. v. United States, supra. The taxing act does not, we think, violate a vested interest

in such case for the reason that a contingent right can never become completely vested until the event occurs upon which it depends.

In Burnet v. Wells, supra, the court said, at pages 677 and 678: "The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases. • • • Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as [fol. 27] overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. Milliken v. United States, 283 U. S. 15, 24, 25; Reinecke v. Smith, supra. Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. Corliss v. Bowers, supra; Reinecke v. Smith, supra. Government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249, 268; Bromley v. McCaughn, 280 U. S. 124, 136." In further support of this contention plaintiffs cite May v. Heiner, supra, and McCormick et al. v. Burnet, 283 U. S. 784. In the first, which arose under section 402 (c) of the Revenue Act of 1918, the trust instrument transferred a life estate to one beneficiary and the remainder to the grantor's children, "their distributees or appointees." The court held the title in the latter had been definitely fixed by the trust instrument. In the second there was likewise no contingent reversion to the donor. An analysis of the trust instrument, which appears in the footnote to the opinion, discloses that upon the death of any beneficiary his share was payable as he might direct by will and in default thereof to his surviving issue, and

in default of surviving issue to the surviving beneficiaries. Under the terms of the trust the corpus could never be returned to the donor upon the death of any beneficiary. In the case of Nichols v. Coolidge, supra, also involving section 402 (c) of the 1918 Act, the deeds conveyed absolute title to the real estate with covenants of warranty. The trust instrument reserved a life estate to the grantor and provided that the interest of any beneficiary predeceasing the grantor should pass as provided by the statute of distribution in effect at the time of the death of such survivor.

In those cases the title of the beneficiary did not depend upon the death of the donor; there was a title sufficiently vested in the beneficiary to pass, at his death, to his heirs or assigns. This *dis-* distinction is fundamental when the character of the rights of the "other beneficiaries" in the instant case are considered. Untermyer v. Anderson, 276 U. S. 440, involved a gift fully consummated before the effective date of the Revenue Act of 1924 under which it was sought to be taxed.

Plaintiffs are not entitled to recover and the petition must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 28] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 14th day of February, A. D., 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover.

It is adjudged and ordered that the plaintiffs' petition be and the same is hereby dismissed.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On March 13, 1935, the plaintiffs filed a motion for new trial.

On April 8, 1935, the court entered the following order on said motion:

It is ordered this 8th day of April, 1935, that the plaintiffs' motion for new trial be and the same is overruled.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 39,767. Court of Claims. Term No. 213. Industrial Trust Company and Orland S. Greene, Executors of the Estate of William M. Greene, Petitioners, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1935. Term No. 213 O. T. 1935.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ, and that the case be assigned for argument immediately following No. 83.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 3 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WM. M. GREENE,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

CHARLES P. TAFT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WM. M. GREENE,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioners, Industrial Trust Company, a banking croporation under the laws of the State of Rhode Island, and Orland S. Greene, a citizen of the United States, as executors of the Estate of William M. Greene, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on February 4, 1935.

Judgment Below.

The judgment of the Court of Claims was under date of February 4, 1935. Motion for a new trial was filed March 13, 1935, and was overruled on April 8, 1935.

Questions Presented.

Whether the provisions of Section 302 (c), (g) or (h) of the Revenue Act of 1926 (44 Stat. 9, 70, 71) apply or may be constitutionally applied in the case of a policy of insurance taken out by the decedent upon his own life which became a paid-up policy on March 4, 1912, where it was payable to his wife for her sole use, if living, and, if not living, to his surviving children, or their guardian, for their use, or if there were no children surviving, then to his executors, administrators or assigns, the wife having predeceased him and three children having survived him.

Statutes and Constitutional Provisions Involved.

The pertinent provisions of the Revenue Act of 1926 (44 Stat. 9, 70, 71) read as follows:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. • • •
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> • • • • • • •
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. • • •

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

The provision of the Constitution which plaintiffs claim is applicable is the Fifth Amendment:

"No person • • • shall be deprived of • • • property, without due process of law."

Statement.

The facts are not in dispute and were stipulated in the Court of Claims. Plaintiffs, as executors of the estate of William M. Greene, deceased, who died on May 30, 1930, a citizen and resident of Rhode Island, included in his gross estate the proceeds of certain life insurance policies against which there applied the credit of $40,000.00 authorized by Section 302 (g) of the Revenue Act of 1926. They did not include the proceeds of the Equitable Life Assurance Society policy involved in this case. It was a tontine policy originally for $50,000.00 taken out on March 2, 1892. On February 19, 1912, William M. Greene surrendered it for its value in paid-up insurance. On March 4, 1912, endorsement was stamped on the policy reciting that since the premium due March 2, 1912, had not been paid, it was agreed and declared that in accordance with the wish of the assurant the policy had become a paid-up policy for $42,000.00 without profits or participation in dividends and requiring no further payments. The policy was payable to the wife of the decedent, if living, and if not living, to the surviving children of the decedent, or if there were no such children surviving him, to the executors, administrators and assigns

of the decedent. His wife did predecease him and the proceeds of the policy after his death were paid to his three children.

In the final audit and determination, the Commissioner of Internal Revenue did include the proceeds of this policy in the estate. A closing agreement was entered into with reference to the tax liability of the estate, and was duly approved by the Under Secretary of the Treasury. It contained the following clause:

> "Whereas said taxpayer agrees to this determination, reserving, subject to statutory limitations, the right to file a claim for refund as to the tax involved in the inclusion of the $42,000.00 Equitable Life Assurance Company of the United States policy in the gross estate."

The petitioners filed evidence of the payment to the State of Rhode Island of eighty per cent of the tax shown to be due by the final audit (including by reason of this policy the sum of $3,024.00), and duly filed with the Collector of Internal Revenue for the District of Rhode Island their claim for a refund of $756.00, representing the excess of the taxes paid to the United States over the correct tax due if the proceeds of the policy should not have been included in the estate. The claim for refund was based upon the statement that:

(1) The beneficiary was not the estate of the insured.

(2) The decedent had no right to change the beneficiary.

(3) Decedent had no right to borrow money on the policy.

(4) The decedent could not receive the cash surrender value of the policy.

It was further contended that the fact that the policy was payable to the insured's estate in the event of the prior

death of the beneficiaries did not make the policy taxable. The claim for refund was rejected by the Commissioner of Internal Revenue on August 23, 1933. This suit was filed on September 25, 1933. It was argued before the Court of Claims on the 8th of May, 1934.

Rulings of the Court Below.

The Court of Claims held that this policy was included within the language of Section 302 (*g*) *of the Revenue Act of* 1926. It conceded the possibility that a life insurance policy absolutely assigned or made payable to a beneficiary, his executors, administrators or assigns, would not constitute a part of the gross estate of the insured under that section. It distinguished the present case on the ground that "the decedent did not divest himself (his estate) of all beneficial interest in the proceeds of insurance payable upon the policy, and his interest therein was not extinguished until his death. No absolute right was acquired by the beneficiary during the life time of the insured to the proceeds of the insurance. Such right was contingent upon the prior death of the decedent. • • • We think it cannot be successfully contended that these contingencies were so remote as to take the case outside of the provisions of the statute, for we cannot speculate upon whether a beneficiary will outlive the insured." (Citing *Klein* v. *United States* (1931), 283 U. S. 231.) It refused to concur in the decision of the Board of Tax Appeals in *Parker* v. *Commissioner* (1934), 30 B. T. A. 342, and the decision of the United States District Court for the Western District of Kentucky, in *Ballard* v. *Helburn* (1934, W. D. Ky.), 9 F. Supp. 812, which it conceded were to the contrary.

The court next held that the inclusion of the policy within the terms of Section 302 (*g*) *of the Revenue Act of* 1926 *did not violate the due process clause of the Fifth Amendment to the Constitution*, for the same reason, namely, that

the title to the proceeds of the policy had not completely vested prior to the death of the decedent, and that the inclusion of the proceeds in the estate did not measure the tax by the inclusion of the property of another. (Citing *Knowlton* v. *Moore* (1900), 178 U. S. 41; *Tyler* v. *United States* (1930), 281 U. S. 497; *Klein* v. *United States* (1931), 283 U. S. 231.) The court distinguished the case of *Central National Bank* v. *Hume* (1888), 128 U. S. 195, on the ground that the policy there was payable to the beneficiaries named, their heirs, executors or administrators, whereas in this case the policy was not so payable. The court also distinguished the case of *McCormick* v. *Burnet* (1931), 283 U. S. 784, on the ground that in that case "there was likewise no contingent reversion to the donor. • • • Under the terms of the trust the corpus could never be returned to the donor upon the death of any beneficiary."

Reasons for Granting the Petition.

1. *The question involved in this case is one of great public and general interest.* It is in substance the question of whether property of a person, whether in a trust or in an insurance policy, as to which a contingent remainder or a possibility of reverter belongs to a second person and is terminated by his death, may be taxed at its full value as a part of the estate of the second person. This was a question involved in the case of *McCormick* v. *Burnet* (1931), 283 U. S. 784, and in *Helvering* v. *Duke* (1933), 290 U. S. 591. While we believe that the issue has been settled by those cases, the Commissioner of Internal Revenue is refusing to accept that position, and is including in the gross estate of all decedents every trust and every insurance policy in which the decedent had a contingent remainder or a possibility of a reverter. See Regulations 80, Article 25:

"The decedent possesses a legal incident of ownership if the rights of the beneficiaries to receive the proceeds are conditioned upon the beneficiaries surviving the decedent."

2. *The courts of the United States are in conflict* on this question. Judge Dawson, in *Ballard* v. *Helburn* (1934, W. D. Ky.) 9 F. Supp. 812, decided that a policy payable to the decedent's wife, if living, otherwise his daughter, if living, and if not then the estate of the insured, could not properly be included in his estate. This case is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and has been passed for argument until the fall. The United States Board of Tax Appeals held in *Parker* v. *Commissioner* (1934), 30 B. T. A. 342, that the proceeds of a policy payable in case of the prior death of the beneficiary to the executors, administrators and assigns of the insured, should not be included in the gross estate.

The Court of Claims in this case has refused to follow these decisions although it concedes they are in point. The Circuit Court of Appeals for the First Circuit has since that time decided the question the same way, but without discussing the issue. *U. S.* v. *Bingham* (1935, C. C. A. 1), 76 F. 2d 573, reversing 7 F. Supp. 907. A petition for certiorari in the *Bingham* case is pending in this Court.

3. *This is an important question of Federal law which should be settled by decision of the Supreme Court.* This Court has recognized the importance of the question as applied to trusts by granting certiorari in the case of *Helvering* v. *St. Louis Union Trust Company*, No. 879, October Term, 1934 (May 20, 1935).

The court has not passed upon the question as applied to insurance policies. It should do so at the same time as in

the case of trusts by granting this petition and the petition in the case of *Bingham* v. *United States*, No. 83, October Term, 1935, filed May 29, 1935.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

CHARLES P. TAFT,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

One opinion was delivered by the Court of Claims. It was written by Judge Littleton and filed February 4, 1935. It appears at p. 18 of the record and is reported in 9 F. Supp. 817.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U. S. C. A., § 288).

The judgment of the Court of Claims was entered on February 4, 1935. Motion for new trial was filed March 13, 1935, and was overruled on April 8, 1935. (R. 29.) The petition was filed on July 3, 1935.

The Facts.

The facts are stated in the petition, page 3. We emphasize only a few points.

In the first place the policy was surrendered and became paid up in March, 1912, and no further payments could be called for, nor were any made by the decedent between that date and the date of his death, May 30, 1930.

In the second place, this surrender left the decedent with no further interest in the policy except a possibility of reverter. He could not change the beneficiaries or borrow on it, there was nothing more he could surrender, and no claim could be made by him on the company with reference to it.

In the third place, the possibility of reverter was a very remote one and so remote as to be really insubstantial in

the highly practical field of taxation. It appears that Mr. Greene was at least sixty when he died and left three children living. The possibility of reverter therefore involved the prior death of three persons, all at least twenty years younger than the decedent. Such a possibility of reverter could not as a matter of judicial notice be estimated, just before Mr. Greene's death, as having any value at all, or at most a very small fraction of the face value of the policy.

ARGUMENT.

Summary.

I. The policy and its proceeds were property belonging, not to the decedent or after his death to his estate, but to the beneficiaries from the date of its surrender in 1912.

II. The reservation by the decedent of a remote interest if he should survive his wife and all three of his children did not prevent the vesting in 1912 of the complete interest of the beneficiaries.

III. The Revenue Act of 1926 does not apply to policies owned by beneficiaries before it went into effect.

IV. The Revenue Act of 1926 cannot constitutionally apply to interests vested in others before it became effective.

V. The transaction of March 2, 1912, was not a gratuitous contingent transfer by the decedent to the beneficiaries intended to take effect in possession or enjoyment at his death.

VI. This transaction was not testamentary in character.

VII. The possibility of reverter or contingent reversion was unsubstantial and the measure of the tax could only be its actual value, not the face value of the policy belonging to others.

I. Policy belonged, not to decedent, but to beneficiaries.

This was a tontine policy which gave to Mr. Greene upon the expiration of the tontine period, March 2, 1912, the choice of six methods of settlement. He chose to surrender the policy and take paid-up insurance. It is settled law by decision or statute in every state, that the rights of the beneficiaries thereupon became absolute unless he specifically retained the right to change the beneficiaries, or withheld some other interest in the policy. This he did not do. The rights of the beneficiaries thereafter could not be defeated by any act of the insured or the insurer. Vance, Insurance (2d Ed., 1930) 541.

We quote from Vance, page 542:

> "With the absolute exception of Wisconsin, it is fully established in all of the states of the American Union that the rights of the person unconditionally designated as the recipient of the money payable under a contract of old line life insurance are vested. The meaning of this somewhat uncertain term as used in this connection is that the beneficiary so designated has a present right, subject to no condition precedent, or contingency, to receive, whenever and however the policy matures, whatever sum may become payable in accordance with its terms, with consequent immunity from any unauthorized interference with that right by the insured or the insurer * * * Hence it follows quite logically that neither the insured nor the insurer, nor both conjointly, can by any act not expressly stipulated for in the contract defeat his right."

This position has been sustained by this Court in the familiar case of *Central National Bank* v. *Hume* (1888), 128 U. S. 195.

> "It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued to the person or persons named in it, to the

beneficiary or beneficiaries, and there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." 128 U. S. 195, 206.

See also 37 C. J. 577; 14 R. C. L. 1376; 7 Cooley, *Briefs on Insurance* (2d Ed.) 6399. Unless the right were specifically granted, he could not borrow on the policy or surrender it except for the beneficiaries' benefit. *Ricker* v. *Charter Oak Life Ins. Co.* (1880), 27 Minn. 193, 6 N. W. 771, 38 Am. R. 289.

There is no doubt that if the right to change the beneficiary is reserved by the insured, the proceeds may be taxed as part of his estate. *Chase National Bank* v. *United States* (1929), 278 U. S. 327. It has now been held that this may be done even though the policies were taken out before the date of the Act. *Levy* v. *Commissioners* (1933, C. C. A. 2) 65 F. 2d, 412.

It is also held that even though the right to change the beneficiary is not reserved, but a surrender for cash is permitted, or loans which will wipe out the interest of the beneficiaries, the proceeds may also be taxed. *Sampson* v. *United States* (1932, D. Mass.) 1 F. Supp. 95.

In the case at bar, however, there is not only no right reserved to change the beneficiaries, but there is no grant of a right to borrow on the policy, or of a right to surrender it again.

The law of New York governs the construction of this policy. Mr. Greene was a resident of Rhode Island at his death. The policy refers to the fact that the insurance company had its office in New York and the policy was payable there. The usual rule would refer to the law of the state where the policy was delivered and the first premium paid, but there is no evidence about that, except that Mr. Greene died a resident of Rhode Island. See *Northwestern Mutual* v. *McCue* (1912), 223 U. S. 234.

However, the courts of Rhode Island in circumstances like these refer to the law of the state where the contract was to be performed, that is, New York. *Re Peckham* (1908), 29 R. I. 250, 69 Atl. 1002, 132 A. S. R. 813.

In addition the language of the policy itself bears out the view that the parties had the New York law in mind. The beneficiary clause, "to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the Statute, and, if not living, to the surviving children", obviously refers to section 52 of the Domestic Relations Law of New York. One of the many cases construing this statute involves a policy of a different New York company in which the language of the beneficiary clause is identical with the above. See *Bradshaw* v. *Mutual Life Ins. Co. of N. Y.* (1912), 205 N. Y. 467, 98 N. E. 851.

Under the New York law there is no possible doubt since *Whitehead* v. *N. Y. Life* (1886), 102 N. Y. 143, 6 N. E. 267, that the general rule applies. See *Levy* v. *Commissioner* (1933, C. C. A. 2), 65 F. 2d. 412. But the Court of Claims sought to distinguish this case because the insured did not completely divest himself of all contingent beneficial interest.

II. The reservation by the decedent of a remote interest did not prevent the vesting in 1912 of the complete interest of the beneficiaries.

The language of the beneficiary clause above referred to, though conditional in form, with a remainder over, established a vested interest in the wife when the policy became paid up in 1912, and the policy belonged to her absolutely as long as she lived. The New York courts have frequently passed upon the question and have left no possible doubt. *Whitehead* v. *New York Life* (1886), 102 N. Y. 143, 6 N. E. 267; *Bradshaw* v. *Mutual Life Ins. Co.* (1912), 205 N. Y. 467, 98 N. E. 851; *Chatham Phenix Nat. Bank* v.

Crosney (1929), 251 N. Y. 189, 167 N. E. 217; *Anderson* v. *Northwestern Mut.* (1933), 261 N. Y. 450, 185 N. E. 696. In the latter case the husband borrowed on a policy payable to the wife if living, otherwise to the husband's estate. The statute permitted the "owner" to borrow, and the court held the wife was the owner.

It is impossible to interpret the language of Mr. Greene's policy as if it read:

> "to the wife, the children, or the decedent, depending upon which survived the others,"

as the Government asserted and the Court of Claims held in effect. The parties might have so stated, but that language was not chosen, and instead the language was chosen which, under the controlling decisions, gave the wife an absolute vested interest and upon her death gave the same kind of interest to the children, subject of course to a condition subsequent. If the interpretation of the Court of Claims were correct, then the death of one of the three children and the death of the mother, followed by the death of the insured with two of the children surviving, would have given the proceeds of the policy to the two surviving children. However, such is not the rule. In *Re Peckham* (1908), 29 R. I. 250, 69 Atl. 1002, 132 A. S. R. 813, the policy was payable to the wife, or, in the event of her prior death, to their children. The wife died first, without issue. It was held in spite of the contingent language, that the proceeds went to the executors of the wife. The court said: "Celia S. Peckham took a vested interest in the policy subject to the condition consequent of her death before her husband, leaving issue."

See also Vance, *Insurance* (2d Ed. 1930) 581, and cases cited, especially *Continental Life Ins. Co.* v. *Palmer* (1875), 42 Conn. 60, 19 Am. R. 530; *Pape* v. *Pape* (1918), 67 Ind. App. 153, 119 N. E. 11; *Fidelity Trust Co.* v. *Marshall* (1904), 178 N. Y. 468, 71 N. E. 8.

This general rule was followed by this Court in *Central Bank* v. *Hume* (1888), 128 U. S. 195. The policy was payable to the wife of the insured, her executors, administrators and assigns. The Court of Claims distinguished the case because the legal representatives of the wife were named. The difference is quite immaterial. In that very case if the wife and children had died intestate without issue before the insured, the proceeds of the policies would have gone eventually, in whole or in part, to the estate of the insured. The only real difference is that the form chosen by Mr. Greene avoided the necessity of having the proceeds pass through two estates. This so-called distinction is not supported in any case or text book, so far as we can find.

The same kind of question has arisen when creditors have sought to include life insurance in the assets of a bankrupt. The courts have held in such cases that only the actual cash value to the bankrupt may be brought in, not the value belonging to the beneficiaries, though there may be a possibility of reverter to the bankrupt. *In re Schaefer* (1910, N. D. Ohio), 189 F. 187; *In re Majors* (1917, D. Ore.), 241 F. 538; *In re Simmons & Griffin* (1919, C. C. A. 1), 255 F. 521.

> "Consistently with the settled rule that a person absolutely designated as beneficiary in a policy to receive money payable thereon has an indefensible vested interest therein, it has been universally held that the insured's trustee in bankruptcy has no interest in such policies. The same rule is applied even though by the terms of the policy the right of the beneficiary depends upon her surviving the insured; and even though, in case of endowment policies, the beneficiary's right to receive payment is contingent upon the insured's dying before the expiration of the endowment term." Vance, *Insurance* (2d Ed., 1930), 632.

In *Re Simmons & Griffin* (1919, C. C. A. 1), 255 F. 521, the bankrupt had a 20-year endowment policy payable in case of his death during the 20-year period to his wife. She was called the contingent beneficiary, but it was held that her interest in the policy was such that the policy could not be surrendered without her consent, and that the surrender value was not an asset in bankruptcy. The court cited *Central National Bank* v. *Hume*, above cited.

The question then is whether this general rule governs when an insurance policy of this character is sought to be brought into the estate under the Revenue Acts. As previously stated the question has been carefully considered in several cases and decided in the way for which we contend. *Ballard* v. *Helburn* (1934, W. D. Ky.) 9 F. Supp. 812; *Parker* v. *Commissioner* (1934), 30 B. T. A. 342. We stand upon the excellent reasoning of these cases.

On the other hand, in *U. S.* v. *Bingham* (1935, C. C. A. 1) 76 F. 2d. 573, without discussing the language of the policy, the rights reserved by the insured or the vesting of the wife's interest, the Circuit Court of Appeals decided this issue to the contrary. All that appears from its opinion is that there were four Berkshire policies payable to the wife of the insured if she survived her husband. It is only from an examination of Judge Brewster's opinion in the District Court that we find the insured could surrender three of the four policies for cash. See 7 F. Supp. 907. Judge Brewster decided that the language of the policies was immaterial because they were taken out before 1918, and that the holding in *Lewellyn* v. *Frick* (1925), 268 U. S. 238, exempted them from the Revenue Act. The reviewing court held that the 1918 Act did apply to policies taken out before it became effective, and included all four. That holding is not inconsistent as applied to three, but as to the one where there was no right to change the beneficiary or

to receive the surrender value, the language of the policy may have been such as to make the case an authority against us.

III. The Revenue Act of 1926 does not apply to policies owned by the beneficiaries before the preceding acts went into effect.

The statute includes in the gross estate "all property • • • (g) • • • to the extent of the excess over $40,000.00 of the amount receivable by all other beneficiaries". "Property" must clearly mean the property of the decedent, not the property of some one else. This necessarily limits the meaning of subsection (g) which therefore cannot apply to a policy belonging absolutely to someone other than the decedent. Congress did not add to or modify this meaning by the enactment of subsection (h). This is a reasonable interpretation, which the Court of Claims adopted itself in *Guettel* v. *United States* (1930), 67 Ct. Cls. 613, as to insurance policies unconditionally assigned to the insurer's wife. So in *Levy* v. *Commissioner* (1933, C. C. A. 2) 65 F. 2d. 412, one of the policies provided for the payment of an annuity to the insured's wife after his death, with no reservation of any control over it. The court held the value of this annuity was not covered by the statute. In *Anthracite Trust Co.* v. *Phillips* (1931, M. D. Pa.) 49 F. 2d. 910, there was the same result in the case of an ordinary policy with no rights reserved in the insured.

Following *Lewellyn* v. *Frick* (1925), 268 U. S. 238 therefore, this Court should avoid raising the constitutional question by adopting the interpretation of the statute which excludes this policy, and avoids any constitutional issue.

IV. The Congress cannot constitutionally tax interests which vested before it took effect.

This Court has discussed in a number of cases the effect of the Fifth Amendment upon the estate tax provisions of the various revenue acts, as well as its effect upon state succession taxes. In *Saltonstall* v. *Saltonstall* (1928), 276 U. S. 260, the settlor retained the power with one trustee to alter or terminate the trust. The Supreme Court held the trust property was validly taxed under the Massachusetts law since the tax was laid on the privilege of succession and the statute was not an attempt to tax a donor's estate for an absolute gift made when no tax was thought of. The tax was on the beneficiary.

Tyler v. *United States* (1930), 281 U. S. 497, much relied on by the Government and the Court of Claims in the case at bar, was really three cases. In each of them the decedent owned or paid for certain property, real or personal, which was then placed in the name of husband and wife as tenants by the entireties, with a strong suggestion that it was done in order to avoid inheritance taxes. The Supreme Court held that whatever the artificial rules of common law with respect to this peculiar estate, the death of one of the parties became the generating source of important and definite accessions to the property rights of the other. The effort to tax the inclusion of such an interest by the Revenue Acts was therefore not arbitrary, capricious or confiscatory. The same rule was applied to insurance policies in *Chase National Bank* v. *United States* (1929), 278 U. S. 327. In that case, while the beneficiaries were other than the decedent or his estate, the decedent retained the power to surrender and cancel the policies, to pledge them as security for loans, and to dispose of them and their proceeds for his own benefit during his life in such a way as to place the surrender value under control of any bankruptcy court to which he might be brought. The termination of the power of disposition at death was held to operate as an ef-

fective transfer, and therefore the Fifth Amendment was not violated.

On the other hand a very clear distinction is drawn in certain other cases, of which the strongest perhaps are those involving the Coolidge trust. *Nichols* v. *Coolidge* (1927), 274 U. S. 531, and *Coolidge* v. *Long* (1931), 282 U. S. 582. *Nichols* v. *Coolidge* was an attempt to include a trust in the gross estate for the purposes of the Federal estate tax. The Court of Claims in the case at bar said:

> "In the case of *Nichols* v. *Coolidge, supra*, also involving Section 402 (c) of the 1918 Act, the deeds conveyed absolute title to the real estate with covenants of warranty. The trust instrument reserved a life estate to the grantor and provided that the interest of any beneficiary predeceasing the grantor should pass as provided by the statute of distribution in effect at the time of the death of such survivor."

The Court of Claims drew the inference from this language that there was a title sufficiently vested in the beneficiary to pass at his death to his heirs or assigns. However, the Court is referred to the opinion of the Supreme Court of Massachusetts in which it passed upon the same trust in connection with the state inheritance tax (268 Mass. 443, 167 N. E. 757). It held the trust taxable, basing its decision upon these propositions:

> "The ultimate beneficiaries could not be determined with certainty until the death of both settlors. However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them might so predecease, could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate. The interest of the sons surviving the settlors in the trust fund did not

pass to them finally and irrevocably until and because of the death of both settlors."

The Supreme Court of the United States reversed this case in *Coolidge* v. *Long* (1931) 282 U. S. 582, holding that the condition consequent did not render the succession incomplete.

In the case of *Nichols* v. *Coolidge*, the application of the Federal estate tax to this trust was held arbitrary, capricious and confiscatory, because it was sought to include the value of property transferred prior to the passage of the Act. The State argued in the Supreme Court of the United States in this case that the tax could be hung upon the possibility of reverter to the settlors, but the Court rejected that position.

See also for a similar holding where the decedent had retained certain powers of control, *Reinecke* v. *Northern Trust Co.* (1929), 278 U. S. 339.

V. The transaction on March 2, 1912, was not a contingent gratuitous transfer intended to take effect in possession or enjoyment at the death of transferer.

In this respect the question is identical with that involved in many trust cases. In the case of *Heiner* v. *Grandin* (1930 C. C. A. 3) 44 F. 2d 141, 143, the court said:

> "Both of them, trusts and insurance policies, are taxed under the same section of the statute, but under different subsections. In no case has the Supreme Court said, or even intimated, so far as we have been able to discover, that a different principle applies in the taxation of trusts from that applied to the taxation of insurance policies, under Section 402 of the Act in question." (1918 Act).

For complete, and we believe accurate, reviews of the similar cases on trusts, we refer to *Safe Deposit Co.* v. *Tait*

(1934 D. Md.) 7 F. Supp. 40, affirmed in *Tait* v. *Safe Deposit Co.* (1935, C. C. A. 4) 74 F. 2d. 851; and *St. Louis Union Trust Co.* v. *Becker* (1935 C. C. A. 8) 76 F. 2d. 851.

The Federal estate tax is a tax on the transfer of property from the dead to the living, and not a tax upon the privilege of the living to succeed to the property of the dead. It is a transfer tax, not a succession or inheritance tax.

The Government and the Court of Claims relied largely on *Knowlton* v. *Moore* (1900), 178 U. S. 41, and quoted language indicating that a tax may be imposed upon the receipt of property by death. But the Court in this case was discussing the Act of June 13, 1898, which imposed a legacy tax, not one upon the net estate of the decedent. Under the more recent Revenue Acts it is the interest which ceased by reason of the death which is taxed. *Y. M. C. A.* v. *Davis* (1924), 264 U. S. 47.

Those transfers absolutely and irrevocably vesting the corpus in a beneficiary prior to the death of the settlor, and not made in contemplation of death, are not subject to the provisions of 302 (c) of the Revenue Act of 1926, even though they might be subject to tax under certain state inheritance tax laws.

The rights of the beneficiaries here were vested and took complete effect at the time the contract of insurance was amended in 1912. Prior to February 19, 1912, Mr. Green had certain rights defined by the policy. These he gave up for a contract in favor of certain third party beneficiaries. He could have had cash, but instead he made a present gift of a contract right, which so far as concerned him took effect at once, both in possession and enjoyment, by his wife, the beneficiary. Upon her death the right passed immediately and in the same amount to the three children. The right to cash did not mature until his death, but they

had the contract right in 1912, and at her death. *Tyler* v. *Treasurer* (1917), 226 Mass. 306, 115 N. E. 300.

The Government seeks to distinguish this case because of the existence of a possibility of reverter, and relies upon *Klein* v. *United States* (1931) 283 U. S. 231, and the cases following it. But in the case at bar the insured did not reserve any interest comparable to a fee, as was specifically provided in the *Klein* case. Instead, he placed the policy and its proceeds entirely out of his own control. As this Court said in *Coolidge* v. *Long* (1931), 282 U. S. 582:

> "The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of the actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time and nothing but his failure to survive the settlors could prevent it."

The effect of making this policy paid up in 1912 was not very different from the case of a transfer in trust to accumulate the income:

> "The fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend does not make the trust one intended to take effect in possession or in enjoyment at or after the grantor's death." *Shukert* v. *Allen* (1927) 273 U. S. 545, 548.

In *McCormick* v. *Burnet* (1931), 283 U. S. 784, the trust provided for its termination and the reversion to the donor if she survived the beneficiaries, who were her children. The Circuit Court of Appeals (1931, C. C. A. 7) 43 F. 2d. 277, had reversed the Board of Tax Appeals, distinguishing *May* v. *Heiner*, 281 U. S. 238, because of the possibility of reverter or contingent reversion. But this

Court reversed the Circuit Court of Appeals in a memorandum opinion on the authority of *May* v. *Heiner*.

For some reason which we cannot understand, both the Government counsel and the Court of Claims insist that there was not a contingent reversion in the *McCormick* case. We therefore refer to the trust instrument as it appears at 43 F. 2d, 278, note:

> "The trust estate hereby created shall in any and the latest event terminate upon the death of the last survivor of the three children of the said party of the first part, hereinbefore named . . .
>
> "Upon the termination of said trust as aforesaid, both in whole or in part, the trust estate as to which said trust shall be so terminated, shall be paid over and delivered to said party of the first part, if she shall then be living, and in the event that she shall not then be living, shall be paid over and distributed as follows:"

The court itself said (p. 279):

> "The last paragraph which we have quoted from the trust agreement calls for the payment of the trust estate to settlor in case she survived the beneficiaries."

Many courts have so construed the case. See *Safe Deposit Co.* v. *Tait*, 7 F. Supp. 40, 46; *Tait* v. *Safe Deposit Co.* (1935, C. C. A. 4) 74 F. 2d. 851, 857; *Becker* v. *St. Louis Union Trust Co.* (1935, C. C. A. 8) 76 F. 2d. 851, 858; *Commissioner* v. *Bonney* (1933), 29 B. T. A. 45, affirmed in (1935, C. C. A. 2) 75 F. 2d. 1008; *Commissioner* v. *Wallace* (1933), 27 B. T. A. 902, affirmed in (1934, C. C. A. 2) 71 F. (2d) 1002; cert. den. Oct. 15, 1934, 79 L. Ed. 110; *Helvering* v. *Helmholz* (1934, D. C. App.) 75 F. 2d. 245

The Solicitor General in his brief in the *Duke* case, cited below, said (p. 19):

"The *McCormick* case thus involved a limitation somewhat similar to that presented here, since the trust was to cease and determine when all three children died and Mrs. McCormick might survive them."

In *Helvering* v. *Duke* (1933) 290 U. S. 591, the same kind of contingent reversion existed as in this case, and the Board of Tax Appeals held the transfer was not intended to take effect in possession or enjoyment at death. (1931) 23 B. T. A. 1104. The case was affirmed (1933, C. C. A. 3) 62 F. 2d 1057, and affirmed in this Court by an equally divided court.

The same kind of reversion to the grantor in the event of the prior death of the beneficiary existed in *Commissioner* v. *Wallace,* to which we have just referred, in which this Court denied certiorari.

We submit that in the case at bar there were none of the features existing in some degree in all these other cases, whereby the grantor retained various kinds of control over the handling of the trust funds. The insured here had absolutely no interest in the proceeds of the policy unless and until a most unlikely event, entirely beyond his control, took place, namely, the death of his wife and of his three children before him.

So far as the *Klein* case is concerned, 283 U. S. 231, it was decided not so long after *May* v. *Heiner,* 281 U. S. 238. The Court was unanimous in both cases. In the *Klein* case it does not refer to or distinguish *May* v. *Heiner.* Clearly the Court must have regarded the situation in the two cases as markedly distinct. The only substantial difference is one long known to conveyancers. In one case a person may grant a life estate and reserve a fee but provide that if the life tenant survives the grantor, he shall have the fee. In the other case, he grants the life estate and the fee, but provides that if the life tenant and the grantee

of the fee predecease him, then the fee shall revert to him. It may be said that there is no difference in result. But nevertheless, the language is entirely different, the intent is different, and the legal effect is different. In *May* v. *Heiner* the grantor gave a life estate to one person, reserved a possible life estate to herself, and gave the corpus to someone else. In the *Klein* case the grantor gave the life estate to his wife but specifically reserved to himself the corpus, or, in other words, the fee simple. The interest of the wife in the fee was made contingent upon her surviving her husband. The difference in result again might not be so very substantial, but there is no question about the difference in the language, and there is equally no question that the difference in the legal effect resulted in taxing the one and not taxing the other as a part of the estate of the decedent. See also (1932) 32 Col. L. Rev. 1335; (1932) 81 U. of P. L. Rev. 937; (1932) 19 Va. L. Rev. 761.

VI. This transfer was not in contemplation of death, nor was it in any way testamentary in character.

The cases we have cited in the last section nearly all discuss and decide the question whether the transfer involved was made in contemplation of death. If, as we claim, this transaction was complete and vested in the beneficiaries in 1912, then clearly it was not done in contemplation of death. The Government, however, makes the claim that all life insurance is in contemplation of death, and in the Court of Claims asserted that life insurance taken out by a decedent on his own life and for which he pays all the premiums bears such a close and reasonable relationship to death that it is almost universally regarded as part of the estate which he "leaves" when he dies.

On the contrary, it is the general rule in the United States because of the fact that the absolute beneficiary's interest

is vested, that the gift of the policy is not testamentary in its nature. Vance, *Insurance* (2d. Ed. 1930) 558; *Hooker* v. *Sugg* (1889), 102 N. C. 919, 11 A. S. R. 717. English cases are no authority to the contrary, for in England the rule as to the vesting of the beneficiary's interest is not recognized at all, with one exception. Under the Married Women's Property Act (1882), the interest of the wife is as completely protected as under the New York statute. A twenty-payment tontine life policy of the same company, payable in exactly the same terms as Mr. Greene's, was held to create a trust so impregnable that the interest of the *cestui* could not be defeated by the insured by an assignment for benefit of creditors, and the company was ordered to issue a paid-up policy for the benefit of the children. *In re Equitable Life Assurance Soc.* (1911), 27 T. L. R. 213. Under the same rule the husband was prevented from taking the cash surrender option except for the benefit of the wife. *Re Fleetwood's Policy* (1926) Ch. 48. In both these cases there was a contingent reversion to the personal representatives of the husband if he survived.

VII. The measure of the tax if properly imposed at all could only be the actual value of the possibility of reverter, not the face value of the policy.

The statute itself only seeks to tax the "interest" transferred or terminated at death. This was no more than a contingent reversion, and the Government had the burden of showing its value. It made no effort to do so. It is a matter of judicial notice that the value of a reversion after the death of one's three children is worthless in this very practical field of taxation.

If the beneficiary were the mother of the insured, then the value of the policy to the insured would be considerable. *Haskell* v. *Equitable Life* (1902), 181 Mass. 341, 63 N. E.

899. On the other hand, Judge Chesnut, in *Safe Deposit Co.* v. *Tait* (1934, D. Md.), 7 F. Supp. 46, referring to the *McCormick* case, where the possibility was the same as here, a reversion after the death of three children:

> The contingent interest "was a very remote one and * * * so remote as to be really unsubstantial in the highly practical field of taxation."

Referring again to the Government's brief in the *Duke* case, we call attention to the note (p. 19):

> "The probability of the contingency happening in the *McCormick* case was much more remote than here. A parent has far less chance of surviving three children than of surviving one."

Conclusion.

We submit, therefore, that the petition for certiorari should be granted, because the question involved in this case is one of great public and general interest, in which the lower courts of the United States are in conflict, and which, because it is a question of Federal law, should be settled by the decision of the Supreme Court. The Court of Claims was in error because the life insurance policy involved belonged not to the decedent but to the beneficiaries named in the policy, from and after the date of its surrender for paid-up insurance in 1912. Either the Revenue Act of 1926 does not apply to the policy at all, or, if it does, is to that extent unconstitutional. The existence of a contingent reversion did not prevent the vesting in 1912 of the complete interest of the beneficiaries, and this possibility of reverter could only be taxed at its actual value, not at the face value of the policy belonging to others.

Whatever might be the public policy involved if this were an attempt on the part of the decedent by some roundabout means to effect a transfer to his family of as much of his

estate as possible, without having it depleted by estate taxes, there is no such policy involved in this case where many years before his death the decedent took out paid-up insurance which vested in the beneficiaries immediately. The effect was of a completed gift calling for no further contributions from the decedent, and absolutely out of his control. Such a policy should not be included in his estate, and this Court should grant the petition in order to reverse the Court of Claims and cure this unjust result.

Respectfully submitted,

CHARLES P. TAFT,
Attorney for the Petitioners.

(6596-C)

FILE COPY

No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1935

INDUSTRIAL TRUST COMPANY AND ORLANDO S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. Greene, Executors of the Estate of William M. Greene, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 18–28) is reported in 9 F. Supp. 817.

JURISDICTION

The judgment of the court below was entered February 14, 1935 (R. 28). A motion for new trial was overruled April 8, 1935 (R. 29). The petition for a writ of certiorari was filed July 3,

1935 (R. 29). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a life insurance policy, which was surrendered for its value in paid-up insurance in 1912, may be included in the insured's gross estate under Section 302 (g) of the Revenue Act of 1926, where the beneficiaries' interests became absolute only at the insured's death in 1930.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> * * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other

beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act (U. S. C. App., Title 26, Sec. 1094).

STATEMENT

The findings of fact of the Court of Claims (R. 15–17) may be summarized as follows:

The petitioners are the executors of the estate of William M. Greene, who died on May 30, 1930 (R. 15). On May 29, 1931, the petitioners filed an estate-tax return disclosing a Federal tax of $24,168.27 (after allowance for a credit of $96,673.10 for State inheritance tax), which was paid on that date (R. 15).

A life-insurance policy taken out by the decedent on his own life in the Union Central Life Insurance Co., and payable to the decedent's children, was included in the gross estate in the return, less $40,000 thereof, which exemption was allowed by the Commissioner (R. 15).

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society,

was not included in the gross estate in the return filed by the petitioners, but was included by the Commissioner in his final determination, and is the policy involved in this suit (R. 15).

On October 17, 1932, a closing agreement with respect to the tax liability of the estate was entered into by the petitioners and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct tax liability was $128,197.73, subject to a credit not to exceed 80% for State estate, inheritance, legacy, or succession taxes, and also subject to a reservation by the petitioners of the right to file a claim for refund in regard to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society policy in the gross estate (R. 15–16). On November 1, 1932, after taking the appropriate credits for State inheritance taxes, the petitioners paid the full amount of the balance of the tax in the sum of $1,471.28, with interest (R. 16).

The $42,000 policy was dated March 2, 1892, and contained the following provisions (R. 16–17):

> Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city

> of New York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

At the end of the tontine period, namely, March 2, 1912, the policy gave the insured a choice of six methods of settlement (R. 17). On February 19, 1912, the decedent endorsed on the policy the following (R. 17):

> Surrendered as of Mch. 2, 1912, for its value in paid-up insurance.

The insurance company, by an appropriate official, endorsed the policy March 4, 1912, agreeing that the policy had become a paid-up policy of $42,000 (R. 17).

The decedent's wife died before him, but he was survived by his three children, to whom the proceeds of the policy were paid upon the death of the decedent (R. 17).

The tax paid by the estate because of the inclusion in the gross estate of the proceeds of the $42,000 policy was $756 (R. 17). For that amount the petitioners, on November 3, 1932, filed a claim for refund, stating as grounds thereof: (1) that the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy (R. 16). It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the

beneficiaries did not make the policy taxable (R. 16). The claim for refund was rejected by the Commissioner August 23, 1933 (R. 16).

The court below dismissed the petition (R. 28).

ARGUMENT

The petitioners urge that Section 302 (g) of the Revenue Act of 1926, *supra*, p. 2, should not be construed to include the insurance policy involved here because it was issued and became a paid-up policy prior to the passage of a Federal estate tax. We submit, however, that subdivision (h), *supra*, p. 3, clearly makes the section applicable. Cf. *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d) and see *Porter* v. *Commissioner*, 288 U. S. 436, 442; *Chase National Bank* v. *United States*, 278 U. S. 327, 334. *Lewellyn* v. *Frick*, 268 U. S. 238, was concerned with an earlier statute containing no specific direction with respect to its application to policies issued before its enactment. Furthermore, that case has not been interpreted as preventing a construction of such early statutes to include policies issued prior to the existence of estate taxes where, as here, it has been called to the court's attention that death resulted in an enlargement of property rights. *United States* v. *Bingham*, 76 F. (2d) 573 (C. C. A. 1st), pending on petition for certiorari, No. 83, present term; cf. *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561.

The question presented for decision in *Helvering* v. *St. Louis Union Trust Co.*, pending on writ of

certiorari, No. 25, present term, is whether the value of a decedent's remainder interest in a trust should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death" under Section 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 305 (U. S. C., Title 26, Sec. 1094). That case presents a question of statutory construction which stands in need of clarification (see *Commissioner* v. *Schwarz*, 74 F. (2d) 712 (C. C. A. 2d); *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600; *Helvering* v. *Duke*, 290 U. S. 591; cf. *Klein* v. *United States*, 283 U. S. 231), but the present case is not touched by the confusion those decisions have created. This case arises under another provision of the statute which in broad terms requires the inclusion in a decedent's gross estate of the proceeds of all life insurance policies.

The petitioners' constitutional attack upon the statute is directed chiefly at its application here to a policy issued and paid up prior to the passage of an estate tax.[1] There is no prohibited retroactive application of the statute simply because the policy was paid up as early as 1912. That point was not only specifically excluded from the decision in *Lewellyn* v. *Frick*, *supra* (see p. 251), but any ex-

[1] The validity of the statute as applied to policies issued after an estate tax was on the statute books is supported by the reasoning of this Court in *Klein* v. *United States*, *supra*, pp. 234–235; cf. *Hoblitzelle* v. *United States*, 77 C. Cls. 639; *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st).

pressions of doubt in that decision as to the constitutionality of such application have less than the usual authority of statements not required by the decision, because the effect of the rights retained by the insured in the policies involved in that case was neither raised nor considered. See *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14. Life insurance payable to others, but in which the insured has retained an interest, may be included in the insured's estate for purposes of Federal estate taxation. *Chase National Bank* v. *United States*, 278 U. S. 327.

The decedent retained a connection with the rights and interests ~~thereby~~ generated by the contract of insurance. *Burnet* v. *Wells*, 289 U. S. 670, 679. The interests of the beneficiaries in the policy became complete for the first time when the insured died in 1930. The tax was laid upon the happening of that event. The resulting enlargement or ripening of property rights in the beneficiaries and the valuable assurance given them that there could be no change in their rights, make that a proper event upon which to base the tax and make it reasonable to consider that the policy was taken out as a substitute for a testamentary disposition. See *Klein* v. *United States*, *supra*, p. 234; *Porter* v. *Commissioner*, 288 U. S. 436, 444; *Tyler* v. *United States*, 281 U. S. 497, 502–503. A tax thus grounded is not given a retroactive operation by the fact that an early transaction has made certain that the event

chosen by the statute will be accompanied by circumstances justifying the imposition of the tax. *Union Trust Co.* v. *United States*, 73 C. Cls. 315, certiorari denied, 286 U. S. 547; cf. *United States* v. *Bingham, supra.*

The petitioners' contention that the tax should not be measured by the face value of the policy is without merit. Decisions of this Court establish that a tax measured by the full value of property is justified, although the decedent's interest may be subject to outstanding rights (*Tyler* v. *United States, supra; Third National Bank* v. *White*, 287 U. S. 577; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied May 27, 1935, No. 871, October Term, 1934), or may even be unavailable for use to the decedent's benefit. *Porter* v. *Commissioner, supra.*

CONCLUSION

The decision below is correct, and not in conflict with any decision of a Circuit Court of Appeals or with any decision of this Court. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1935.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, executors of the estate of William M. Greene, petitioners

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 18–28) is reported in 9 F. Supp. 817.

JURISDICTION

The judgment of the court below was entered February 14, 1935. (R. 28.) A motion for new trial was overruled April 8, 1935. (R. 29.) The petition for a writ of certiorari was filed July 3, 1935 (R. 29), and was granted October 14, 1935. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a life insurance policy, which was surrendered for its value in paid-up insurance in 1912, may be included in the insured's gross estate under Section 302 (g) of the Revenue Act of 1926, where the insured's interest ceased and the beneficiaries' interests became absolute only at the insured's death in 1930.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

STATEMENT

The findings of fact of the Court of Claims (R. 15-17) may be summarized as follows:

The petitioners are the executors of the estate of William M. Greene, who died on May 30, 1930. (R. 15.) On May 29, 1931, the petitioners filed an estate-tax return disclosing a Federal tax of $24,168.27 (after allowance for a credit of $96,673.10 for State inheritance tax), which was paid on that date. (R. 15.)

A life-insurance policy taken out by the decedent on his own life in the Union Central Life Insurance Co., and payable to the decedent's children, was included in the gross estate in the return, less $40,000 thereof, which exemption was allowed by the Commissioner. (R. 15.)

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society, was not included in the gross estate in the return filed by the petitioners, but was included by the Commissioner in his final determination, and is the policy involved in this suit. (R. 15.)

On October 17, 1932, a closing agreement with respect to the tax liability of the estate was entered into by the petitioners and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct tax liability was $128,197.73, subject to a credit not to exceed 80% for State estate, inheritance, legacy, or succession taxes, and also subject to a reservation by the petitioners of the right to file a claim for refund in regard to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society policy in the gross estate. (R. 15–16.) On November 1, 1932, after taking the appropriate credits for State inheritance taxes, the petitioners paid the full amount of the balance of the tax in the sum of $1,471.28, with interest. (R. 16.)

The $42,000 Equitable policy was dated March 2, 1892, and contained the following provisions (R. 16–17):

> Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city of New York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

At the end of the tontine period, namely, March 2, 1912, the policy gave the insured a choice of six

methods of settlement. (R. 17.) On February 19, 1912, the decedent endorsed on the policy the following (R. 17):

> Surrendered as of Mch. 2, 1912, for its value in paid-up insurance.

The insurance company, by an appropriate official, endorsed the policy March 4, 1912, agreeing that the policy had become a paid-up policy of $42,000. (R 17.)

The decedent's wife died before him, but he was survived by his three children, to whom the proceeds of the policy were paid upon the death of the decedent. (R. 17.)

The tax paid by the estate, because of the inclusion in the gross estate of the proceeds of the $42,000 policy, was $756. (R. 17.) For that amount the petitioners, on November 3, 1932, filed a claim for refund, stating as grounds thereof: (1) that the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy. (R. 16.) It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the beneficiaries did not make the policy taxable. (R. 16.) The claim for refund was rejected by the Commissioner August 23, 1933. (R. 16.)

The court below dismissed the petition. (R. 28.)

SUMMARY OF ARGUMENT

Section 302 (g) of the Revenue Act of 1926, *supra*, p. 2, requires the proceeds of all insurance policies taken out by a decedent on his own life to be included in his gross estate, with an exemption of $40,000 when the proceeds are not receivable by the estate. Subdivision (h) makes the statute applicable no matter when the policies were issued or became paid up. The language of the statute is clear and needs no judicial construction.

Lewellyn v. *Frick*, 268 U. S. 238, dealt with an earlier statute which was not made specifically applicable to policies issued prior to its enactment. Furthermore, the decision in *Lewellyn* v. *Frick*, *supra*, has not been construed as preventing the statute from applying to policies issued before its passage where it has been pointed out that the insured retained an interest in the policy until his death and that his death enlarged and made absolute the interests of other beneficiaries.

Insurance is by nature testamentary in character and may be properly included in the insured's gross estate as a substitute for a testamentary disposition. The date of the issuance of the policy is not important for the tax is laid on account of events occurring at the insured's death. We contend further that the manner in which the insured directed the policy to be paid removes any retroactive operation of the statute. The policy was payable to the insured's wife, if living; if not living, to the sur-

viving children, and if there were no surviving children, to the insured's estate. Thus, the insured retained an interest in the policy, for had he survived his wife and children, the proceeds would have been payable to his estate. In this case the insured's death before the death of the children was the event which made certain that the estate would not take and made the children's interest for the first time absolute. The insured's death was therefore a source of valuable assurance to the children and enlarged their property rights. Those circumstances justify the tax, and since they occurred in 1930, there is no retroactive application of the statute.

The amount includable in the gross estate need not be limited to the value of the insured's conditional interest in the policy, for it is established that the completion of the shifting of the economic benefits of property justifies a tax measured by the full value of the property.

ARGUMENT

I

THE STATUTE PLAINLY REQUIRES THE PROCEEDS OF THE POLICY TO BE INCLUDED IN GROSS ESTATE

Section 302 (g) of the Revenue Act of 1926, *supra*, requires to be included in the decedent's gross estate the amount receivable by the executor as insurance under policies taken out by a decedent upon his own life and the amount in excess of

$40,000 receivable by all other beneficiaries as insurance under such policies. Subdivision (h) of the same section requires the value of the various transfers, property interests, and powers, described in the section, to be included in gross estate

> whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

There is, we submit, no room for construction of the statute. Its language is clear, embracing the proceeds of all life insurance policies no matter when issued or when they have become paid up. Particularly here, where, as we contend, the insured retained an interest in the policy until his death, there is no doubt that the statute requires the proceeds of the policy to be included in gross estate. *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d); cf. *Union Trust Co.* v. *United States*, 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547.

Lewellyn v. *Frick*, 268 U. S. 238, relied upon by the petitioners, was concerned with the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402, which contained no specified direction with respect to its application to policies issued before its enactment. The case cannot therefore be considered as authority for the construction of the statute involved here, which contains such a direction. *Nichols* v. *Coolidge*, 274 U. S. 531, 539. Furthermore, the *Frick* case, in view of subsequent decisions of this Court (e. g., *Chase National Bank* v. *United States*,

278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), has not been interpreted as preventing a construction of the early statute to include policies issued prior to the passage of an estate tax statute, where, as here, it has been called to the Court's attention that the insured retained an interest in the policy until his death and that death resulted in an enlargement of the property rights of others interested in the policy. *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561; *Liebes* v. *Commissioner*, 63 F. (2d) 870 (C. C. A. 9th); *Bingham* v. *United States*, 76 F. (2d) 573 (C. C. A. 1st), pending on writ of certiorari, No. 83. In our brief in the *Bingham* case we have included an argument supporting that decision in this respect. If our contention presented there is correct, we submit that the same result must be reached here *a fortiori*. In any event, we submit that the statute here plainly requires the policy to be included in the gross estate and that its language leaves no room for doubt.

II

THE STATUTE AS APPLIED TO THE POLICY INVOLVED HERE DOES NOT VIOLATE THE CONSTITUTION

We contend that insurance is inherently testamentary in character and may therefore be properly included in the measure of the insured's gross estate for purposes of the estate tax. Our argument that the taking out of insurance is a substitute for testamentary disposition of property, is set forth

in our brief in *Bingham* v. *United States, supra,* and is not repeated here.

The statute does not tax the transfer of the decedent's interest in the policy. It does not deal with any transfer from the decedent. The fundamental theory of the statute is that the insurance proceeds are treated as a fund built up by the payment of premiums with money which might otherwise remain as a part of the decedent's estate when he died, and the insurance policy is regarded as a contract made by the decedent for the benefit of the beneficiaries after his death.

Like the provision dealing with estates by the entireties (Section 302 (e), Revenue Act of 1926), the provision with respect to insurance proceeds requires their inclusion in the gross estate irrespective of whether there is any transfer at death. As in *Tyler* v. *United States,* 281 U. S. 497, the question here is, not whether in the strict sense of the word there has been a transfer, but whether death has brought into being or ripened for the survivor property rights of such a character that Congress may properly include their value in the same class as testamentary dispositions.

If it is accepted that insurance is inherently of a testamentary character, then the question of the validity of this provision should be answered here as was the similar question in the *Tyler* case, namely (p. 502):

> If the event is death and the result which is made the occasion of the tax is the bringing

> into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

In this view no question of retroactivity is involved. The effect caused by the decedent's death is not changed, nor is the enlargement of property rights of the beneficiaries affected, by the date of the insurance policy. The question of retroactivity is as unimportant here as it was in *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, where the estate by the entireties was created prior to 1916.

In this view, decisions dealing with the taxation of strict transfers are not in point, since it is the event of death and not the terms of any instrument which justifies the tax.

It is true that the Treasury Regulations limit the application of Section 302 (g) to those cases where the decedent retained an interest in the policy. Reg. 80, Art. 27. In view of what has been said above, we think that the regulations have unnecessarily limited the application of the statute and, to that extent, may be disregarded. If, however, the application of the statute is properly limited, as indicated by the regulations, we contend that in this case the decedent did retain such an interest as to bring the proceeds of this policy

within the terms of the regulations and the statute. Over and above his general interest in the preservation of the contract (*Burnet* v. *Wells*, 289 U. S. 670, 679), the decedent made such arrangements that his estate might have collected the proceeds of the policy.

The policy was payable to the insured's wife, if living, and if not living, to his surviving children, or, if there were no surviving children, then to the insured's estate. Thus, the insured retained an interest in the policy, for had he survived his wife and children his estate would have been the beneficiary. How the interest is to be described or classified is immaterial. As this Court said in *Klein* v. *United States*, 283 U. S. 231, 234:

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

However the insured's interest may be described, its extinguishment occurred only upon the event of his death before the death of the other beneficiaries.

The chances of all eventually to take the proceeds of the policy were subject to conditions. The insured's estate took if the insured survived his wife and his children. The wife took if she survived the insured. The children took if the insured survived his wife, and the children survived the insured. Though the chances of some may have been better than others it is clear that the death of the insured before the others was, as in the *Klein* case, "the indispensable and intended event" which made certain that the proceeds of the policy would not go back to the estate. As happened in this instance, the insured's death, after his wife had died, made the children's interest for the first time absolute. The insured's death, therefore, was for the children a "source of valuable assurance passing from the dead to the living" (*Porter* v. *Commissioner*, 288 U. S. 436, 444), and brought into being for the children an "enlargement of property rights." *Tyler* v. *United States, supra*, p. 502. It has frequently been held by this Court that when death completes the shifting of the economic benefits of property, producing such results as have been described, the property involved may constitutionally be included in the decedent's gross estate. *Chase National Bank* v. *United States, supra; Reinecke* v. *Northern Trust Co., supra; Tyler* v. *United States, supra; Porter* v. *Commissioner, supra; Gwinn* v. *Commissioner*, 287 U. S. 224;

Klein v. *United States, supra;* see also *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.); *Sargent* v. *White,* 50 F. (2d) 410 (C. C. A. 1st).

The petitioners concede that where the insured reserves the right to change the beneficiary or to take down the cash surrender value of the policy, there is no constitutional objection to including the proceeds of the policy in the insured's gross estate. (Br. 12.) The petitioners seem to draw the conclusion that the insured must have power, during his lifetime, to destroy the interests of the other beneficiaries in order for the tax to escape constitutional objection. We submit, however, that the Constitution makes no such requirement. With respect to property held under tenancies by the entirety it is perfectly clear that the decedents cannot during their lifetime destroy or modify the interests of their co-tenants, and yet it has been held that the value of such property may constitutionally be included in gross estate. *Tyler* v. *United States, supra; Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming *per curiam,* 58 F. (2d) 1085 (C. C. A. 1st), affirming *per curiam,* 45 F. (2d) 911 (Mass.); *Robinson* v. *Commissioner,* 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States,* 8 F. Supp. 694 (C. Cls.), certiorari denied May 27, 1935, No. 871, October Term, 1934. No tax problem or constitutional question was involved in *Washington Central Bank* v. *Hume,* 128

U. S. 195, and the insured, as pointed out by the court below, did not retain any interest in the proceeds of the policies.

The tax being grounded upon circumstances accompanying the insured's death in 1930, there is no retroactive operation of the statute. In *Reinecke* v. *Northern Trust Co., supra,* this Court had before it two trusts created before the passage of any estate tax statute, in which the settlor had reserved the power of revocation. Upon the settlor's death the Commissioner included the corpus of the trusts in the gross estate. It was objected that the Commissioner's action gave the statute a retroactive application forbidden by *Nichols* v. *Coolidge, supra.* But this Court pointed out (p. 345) that the statute

> as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

That reasoning, we submit, is applicable here. This Court again clearly pointed out why the rule of *Nichols* v. *Coolidge, supra,* is inapplicable when the decedent retains an interest in the property, in *Gwinn* v. *Commissioner, supra,* where objection was made to the inclusion in the gross estate of the value of the decedent's interest in a joint tenancy created in 1915. There this Court speaking of *Nichols* v. *Coolidge, supra; Coolidge* v. *Long,* 282 U. S. 582, and *Untermyer* v. *Anderson,* 276 U. S. 440, said (p. 229):

> In them the rights of the survivors became finally and definitely fixed before the passage of the act—nothing was added as the result of death.

We submit, therefore, that the lower courts have been correct in upholding the tax with respect to insurance policies in which the insured has retained an interest, even though the policies were issued prior to the passage of an estate tax law. *Heiner* v. *Grandin, supra*—insured reserved power to change beneficiary; *Liebes* v. *Commissioner, supra*—power to change beneficiaries or to revoke the policy; *Levy's Estate* v. *Commissioner, supra*—power to change beneficiary; *Bingham* v. *United States, supra*—interests similar to the case at bar; power to take the cash surrender value in some policies; cf. *Union Trust Co.* v. *United States, supra.*

Lewellyn v. *Frick, supra,* does not control the constitutional question here. In that case the question of the power of Congress to include in the gross estate proceeds of insurance policies issued before the passage of an estate tax was specifically reserved from decision (p. 251). Furthermore, it appears that the effect of the rights retained by the insured in the policies involved in that case was not raised by the Government nor considered in the opinion of the Court. We submit, therefore, that any expressions of doubt on the part of this Court in that decision with respect to the constitutionality of the statute requiring the inclusion in the gross estate of the proceeds of insurance policies issued prior to

the passage of an estate tax law have less than the usual authority of statements not required by the decision. See *Heiner* v. *Grandin, supra;* cf. *Webster* v. *Fall,* 266 U. S. 507, 511; *United States* v. *Mitchell,* 271 U. S. 9, 14.

The petitioners' contention that the tax should not be measured by the face value of the policy is without merit. Sec. 302 (g) allows a specific exemption of $40,000, but does not allow a deduction on account of interests in the proceeds held by others than the insured. In *Chase National Bank* v. *United States, supra,* the tax was measured by the entire proceeds of an insurance policy, although the surrender value while the decedent lived was much less than this amount, and the proceeds after his death were not available to his estate. In other decisions it has been held proper to measure the tax by the entire value of the property although the interest of the decedent was at all times subject to substantial rights irrevocably granted to others. *Tyler* v. *United States, supra; Third National Bank & Trust Co.* v. *White, supra.* In *Porter* v. *Commissioner, supra,* the tax was measured by the entire value of the property although the decedent had transferred the property in such a way that he had no power to use it for his own benefit. See also *O'Shaugnessy* v. *Commissioner,* 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Commissioner* v. *Emery,* 62 F. (2d) 591 (C. C. A. 7th).

CONCLUSION

The court below correctly held that the proceeds of the policy should have been included in the decedent's gross estate and that the Constitution does not prevent its being included. The judgment of the court below should be affirmed.

Respectfully submitted.

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NOVEMBER, 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

SUPREME COURT OF THE UNITED STATES.

No. 213.—October Term, 1935.

Industrial Trust Company and Orland S. Greene, Executors of the Estate of William M. Greene, Petitioners, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[December 9, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioners, as executors of the estate of William M. Greene, who died in 1930, filed an estate-tax return and paid the amount of the federal estate tax disclosed thereby. A paid-up life-insurance policy of $42,000 was omitted from the return. The Commissioner of Internal Revenue declared a deficiency and included the amount of this policy in the gross estate. Petitioners filed a claim for refund, which was rejected by the commissioner. Thereupon, this proceeding was brought in the Court of Claims to recover the amount of the claim. That court held against the right to recover and dismissed the petition.

The policy, issued in 1892, promised to make payment to the wife of the decedent, as sole beneficiary if living; and if not living, to the surviving children of the decedent; and, in the event of none surviving, then to the executors, administrators, or assigns of the decedent. In 1912, the policy became a paid-up policy requiring no further payment of premiums. No power was reserved to change beneficiaries, borrow on the policy or surrender it. The wife of the decedent predeceased him; but he was survived by three children, to whom the proceeds of the policy were paid upon his death.

The case of *Lewellyn* v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918. This case arises under the act of 1926, § 302 (g), which is the same as § 402 (f) of the former act. Subdivision (h) of the 1926 act, however, provides that subdivisions (b), (c), (d), (e), (f), and (g) shall apply to "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as

severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable. See *Wyeth* v. *Crooks*, 33 F. (2d) 1018, 1019. If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls.

The foregoing facts bring the case clearly within our decision just announced in *Bingham* v. *United States*, 296 U. S. —; and the judgment of the court below is accordingly

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.